IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

HANNAH SCHAFFER, *Plaintiff in Error*,
v.
JULIUS WERLING ET AL.,
Defendants in Error.
} No. 177.

BRIEF OF DEFENDANTS IN ERROR.

This suit arises out of the improvement of Williams street in Huntington, Indiana, under a statute of Indiana known as the Barrett law, enacted in 1889 (sections 4288–4298, Burns' R. S. 1894).

Section 1 of the act provides for a petition of the resident property owners of a city or incorporated town for the improvement of streets, alleys, etc.

Section 2 of said act provides that—

"Whenever cities or incorporated towns, subject to the provisions of this act, shall deem it necessary to construct any sewer or make any of the alley or street

improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

Sections 6 and 7, as amended by the act of 1891 (sections 4293 and 4294, Burns' R. S.), provides that—

"When any such improvement has been made and completed according to the terms of the contract made therefor, the common council of such city, or the board of trustees of such town, shall cause a final estimate of the total cost thereof to be made by the city or town engineer, and the common council of such city, or the board of trustees of such town, shall require said city or town engineer to report to the common council of such city or the board of trustees of such town the following facts touching such improvements: First. The total cost of said improvement. Second. The average cost per running foot of the whole length of that part of the street or alley so improved. Third. The name of each property owner on that part of the street or alley so improved. Fourth. The number of front feet owned by the respective property owners on that part of said street so improved. Fifth. The amount of such cost for improvement due upon each lot or parcel of ground bordering on said street or alley, which amount shall be ascertained and fixed by multiplying the average cost price per running front foot by the number of running front feet of the several lots or parcels of

ground respectively. Sixth. The full description, together with the owner's name of each lot or parcel of ground bordering on said street so improved. Seventh. (Relates to sewers.) (7) Upon the filing of the report provided for in the last preceding section (6), the common council of such city or the board of trustees of such town, shall give two weeks' notice in a newspaper printed and published in such city or incorporated town, if any there be, and if there be no such paper, then in a newspaper printed and published in the county in which such city or incorporated town is located, of the time and place, when and where a hearing can be had upon such report, before a committee to be appointed to consider such reports, and such committee shall make report to the common council of such city, or the board of trustees of such town may adopt, alter or amend such report and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committees and common council of such city or board of trustees of such town, and make objection thereto, and shall be accorded a hearing thereon, and the common council of such city or the board of trustees of such town shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvements."

Section 3 of said act provides that—

"In all contracts specified in the preceding section (2), the cost of any street or alley improvement shall be estimated (not assessed) according to the whole length of the street or alley or part thereof to be improved, per running foot * * * and the city or incorporated town shall be liable to the contractor for the contract price of said improvement, and the owners of lots or parts of lots bordering on such street or alley or part thereof to be improved * * * shall be liable to the city for their proportion of the costs in the ratio of the front line of the lots owned by them, to the whole improved line for street and alley im-

provements * * * and the city or incorporated town shall have a lien upon such lots or parts of lots respectively from the time such improvement is ordered for such costs of improvement, collectible as hereinafter provided. * * * Such city or town shall be liable and pay for all that part of such street or alley improvement as shall be occupied by the street or alley crossings, and may order that any part of the total cost of any of the improvements in this act mentioned shall be paid out of the general fund."

Section 5 of said act (4292 Burns' R. S.) provides that—

"The common council of such city or the board of trustees of such town, with the concurrence of two-thirds of the members thereof, may order or cause any or all of the improvements mentioned in the first section of this act, and repairs of any kind, of streets and alleys to be made in like manner, without such petition, and either charge and cause any or all of the expenses thereof to be assessed, as hereinafter provided, when petition is made, or if it is deemed just and right by the common council of such city or the board of trustees of such town to cause such expenses, or any part thereof, to be paid out of the general revenue of the city or incorporated town."

These quotations seem to set out the law which is in question in this case.

The resolution to improve Williams street, under which the improvement was ordered, is set out at page 11 of the record.

The specifications for said improvement are found at pages 15 and 21, and the contract for the improvement was duly let to the defendants in error, Werling and Draper, who have been substituted parties defendant instead of the city of Huntington (p. 25), the contract whereof is found at page 27 of the record.

It is only necessary to say that the improvement

proceeded regularly to completion in accordance with the statute above mentioned, and the plaintiff in error was assessed $976 as her share of the expenses of the same, which she declined to pay. A precept accordingly was issued against the plaintiff in error for this sum (p. 48), and, on appeal to the Huntington Circuit Court, the matter was duly tried upon an amended transcript, and judgment was rendered against the plaintiff in error in the said sum of $976 (p. 94).

Appeal was taken from the judgment so rendered to the supreme court of Indiana (p. 97), and the judgment of the Huntington Circuit Court was "in all things affirmed" (p. 99), on authority of *Adams* v. *City of Shelbyville*, 154 Ind. 467, the full context of the opinion being set out at pages 107–156 of the record.

The question here is, is the said statute of Indiana constitutional?

We affirm that it is, and the following is submitted as the proof of it:

The plaintiff in error contends that the enforcement of said statute is the exercise of arbitrary authority, and actually takes her property for public purposes without just compensation; and that it is a taking of her property without due process of law.

In passing, it may be observed that all taxation is arbitrary. Those in interest and authority take it into their heads to make an improvement, and seek to progress with our civilization, and others object and hold back. Because the consent of the objectors can not be obtained they cry "arbitrary power," "unjust taxation," "government without consent," "appropriation of private property for public uses without just compensation," "no due process of law," etc., etc. It is the history of progress from the beginning

and will, doubtless, continue to the end of time. Were objectors to have their way the world of progress would halt in its course and stagnation would fill the halls of civilization. This supposed arbitrary method is, after all, only the development of the principle in our institutions of the government of the majority.

The only question in the improvement age in which we live is to see that there is no discrimination against the objectors and the minority in our civilization; but that they shall be treated exactly like everybody else; that their rights shall be duly considered along with everybody else who may be interested in the subject-matter. In making improvements it is always to be supposed that those charged with the expenses of the improvements will be benefited thereby. Indeed it is only upon this theory that improvements may be compelled. And we may also say, indeed, an improvement can not be made without a benefit resulting from it in some direction. Benefits must necessarily result from improvements. The thing to do, in making an improvement, is to so regulate the cost thereof with respect to the resulting benefits as that all shall be made to share relatively and equally therein. How shall this be done? There are ways and ways of doing this. No one of the "ways" may be free from criticism, or even free of some inequality, but it is so, not because it is arbitrarily done, nor because it is done without the assent of objectors, but because human judgment can not frame anything in absolute perfection.

Now, this Barrett law takes the frontage of property as the basis upon which to calculate costs and benefits of improvements, and in order that no property owner in the affected district may be assessed a benefit from

the improvement merely to equal the costs thereof, should the costs actually exceed the benefits, the excess of such costs is charged against the city or town within which such improvement is made, and thereby the general public pays for the general benefits. It is possible for the general public to be benefited by an improvement while the property owner is specially benefited. And why may not general benefits be paid for from the general fund? The property owner who has been specially benefited has only been charged his fair proportion, and he has no just complaint in the devotion of the general fund to the costs of such excess improvements. Frontage is a reasonable measure of costs and benefits in an improvement.

In Cooley on Taxation (2d ed., 1886), page 644, it is stated that "It can not be denied that in case of some improvements frontage is a very reasonable measure of benefits, much more just than *value* could be, and perhaps approaching *equality* as nearly as any estimate of benefits made by the judgment of men."

In Dillon on Municipal Corporations (1890) it is declared, on authorities, that frontage may be made the basis of apportionment.

It is declared by the same author that laws which impose upon property the cost of local improvements do not deprive the owner of his property without due process of law within the meaning of the fourteenth amendment of the constitution.

Davidson v. *New Orleans*, 96 U. S. 97, 104;
County of Mobile v. *Kimbal*, 102 U. S. 691;
Hagar v. *Reclamation Dist.*, 111 U. S. 701;
Wurtz v. *Hoagland*, 114 U. S. 606;
Walston v. *Nevin*, 128 U. S. 578;
Spencer v. *Merchant*, 125 U. S. 345;
Williams v. *Eggleston*, 170 U. S. 304;
Parsons v. *Dist. of Col.*, 170 U. S. 45.

Uniformity and equality are to be obtained if possible in all this taxing business. Uniformity and equality are the objects to be sought. When these are accomplished perfection is attained, and no one may reasonably complain.

The public has an interest in all public improvements. The individual has an interest therein where his property is affected. The property owner should pay no costs of an improvement in excess of the benefits he receives from such improvement. If the public derives benefit from such improvement above what the property owner derives therefrom, the public treasury should pay it. This is fair.

This is the doctrine laid down by the supreme court of Indiana in this case, and it is the doctrine announced in the case of *Tide-Water Co.* v. *Coster*, 18 N. J. Eq. 518, at page 527.

It is the doctrine of this court in *Norwood* v. *Baker*, 172 U. S. 269, we submit.

The supreme court of Indiana in its opinion, at pages 113 and 114 of the record, sets out this principle and founds its conclusions upon it. The opinion further holds that the statute in question does not violate this principle. And we submit that the statute does not.

The reasoning of the supreme court of Indiana on this subject, at pages 114–116, is deemed conclusive as to the existence of this principle in said statute.

Section 3 of said statute, quoted above, provides that the costs of an improvement shall be calculated by the running foot; the city or town shall be liable for the contract price; and, to reimburse it, the property owners are liable to the city or town for their legal proportion of the cost in the ratio of their several frontage feet to the total frontage feet improved. As

the Indiana Supreme Court say, three things are noted in the provisions of this law, namely: (1) That the cost shall be *estimated* by the running foot; (2) that the liability shall relate to the frontage, and (3) that the liability and lien shall arise and attach at the time the improvement is ordered.

Said section 3 provides a basis for assessments which is subject to modification by the council of the city or board of trustees of the town. This "basis" is the actual special benefits of the improvement.

Said section 7 makes it the imperative duty of the common council of the city or board of trustees of the town to adjust the assessments and to make the same conform to the actual special benefits accruing to each of the abutting property owners.

Said section 5 requires the common council of the city or board of trustees of the town to see that the costs of the improvement do not exceed, to the abutting property owners, the actual special benefits derived to them and each of them therefrom; that if the costs do exceed the special benefits, the excess shall be taken as general benefits and paid for from the general treasury of the city or town.

As the supreme court of Indiana says, at page 122 of the record, here is a new power granted the common council of the city or board of trustees of the town, to order, by a two-thirds vote, any improvement; and the improvement may be paid for in either of three ways:

1. It may charge the whole expense against the general revenues;

2. It may charge part of the expense against the general revenues and part against the abutting owners;

3. Or it may charge the whole expense to the abutting property owners.

Always bearing in mind that the basis for either charge and any charge is the actual and special benefits accruing from the improvements and that the costs must not exceed the benefits, general or special, or *both*.

This is shown by the statement in section 5, that the expenses shall be assessed "as hereinafter provided" (in sections 6 and 7).

It sometimes, and often does happen, that the total cost of the improvement is not known to the common council or board of trustees until the hearing provided for in said section 7; and while the city or town authorities have set out to charge the abutting owners with the costs of the improvement, it may turn out at this "hearing" that the costs exceed the special individual benefits. Now, what is to be done? The contractor has completed his work and calls for his money. Can the city or town refuse to pay and declare the contract *ultra vires* because the costs exceed the special benefits and wrong the contractor out of his earnings?

No. They will simply charge up the excess of costs to the general fund, and thereby preserve the uniformity and equality of costs and benefits. They will invoke the authority of said section 3.

As the supreme court of Indiana also well says, at page 123, the contingency of deficit of special benefits to pay costs arises from the law, and enters into the order for the improvement and the contract for the work, and is but a reasonable exercise of the continuing power to pay any part of the expenses from the general revenues, when it is definitely ascertained that the costs exceed special individual benefits.

This law is, therefore, so framed that it is sure to secure to individual property owners uniformity and

equality in the frontage calculation, and that they will never be called upon to pay any costs in excess of the benefits they derive.

This being so, it is difficult to see wherein this statute takes property without due process of law; that it takes property without just compensation; or that it invades any rights of the citizen which he is not bound to share with the public, of which he is a constituent part.

The Legislative Scope.

The Indiana constitution (section 1, article 10) says: "The general assembly shall provide by law for a uniform and equal rate of assessment and taxation."

The legislature has the power to say *what* property shall be taxed, and to name some officer or tribunal to assess the tax. The legislature may determine what property is benefited by improvements.

All property in a county may be assessed to build a court-house.

All the property in a city may be taxed to build a free gravel road, or a railroad or other public work, or a part of the property therein may be taxed for such a purpose.

Indeed the power of taxation rests exclusively in the legislature.

> *United States* v. *New Orleans*, 98 U. S. 381;
> *Merriweather* v. *Garrett*, 102 U. S. 472.

In the case of *Spencer* v. *Merchant*, above cited, the legislature was held to have properly determined what property was benefited, and, having determined this, the owners of the assessed property are concluded, and they have no right to be heard in a court upon the

question of whether their lands are benefited or not. It would lead to confusion and doubt in the making of *all* improvements if each property owner were permitted to dispute the question of benefits arising therefrom. If the legislature has the exclusive right to determine such question it may designate the common council of a city or the board of trustees of a town to dispose of the details of improvements, such as figuring out the costs, calculating the benefits, etc.

In the *City of Ft. Wayne* v. *Cody*, 43 Ind. 197: "The question of benefits to property in a city from the construction of a sewer having once been passed upon by the common council, no other court or tribunal has any power to review or pass upon it. The legislature has granted the sole power to it to try the question."

See, also, *Palmer* v. *Stumph*, 29 Ind. 337.

In the case of *Gavin* v. *Daussman*, 114 Ind. 435, it was ruled:

"That the common council of a city may determine what property, within the limits defined, will be benefited by the improvement, and the decision of the common council may be made final."

In the 100 New York case (*Spencer* v. *Merchant*), it is said:

"That the precise wrong of which complaint is made appears to be that the land owners now assessed never had an opportunity to be heard as to the original apportionment, and find themselves practically bound by it, as between their lots and those of the owners of those who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised, and the property to be assessed. Unless by special per-

mission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion, and all questions of prudence, propriety and justice being confined to its jurisdiction. It may err, but the courts can not review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and second, when it designated the lots and property which, in its judgment, by reason of special benefits should bear the burden; and having power, we can not criticise the reason or manner of its action. The land owners were given a hearing, and so there was no constitutional objection in that respect. Nor was the hearing illusory. It opened to the land owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and that objection failing it opened the only other possible question of the amount or mode of the apportionment itself. We think the act was constitutional."

On appeal to this court (125 U. S. 345) the court, through Mr. Justice Gray, said: "The general principles upon which that judgment rests have been affirmed by this court. The power of taxation belongs exclusively to the legislative branch of the government."

This fits the case at bar to a nicety.

In the *Fallbrook Irrigation District* case, 164 U. S. 112, it is held that—

"Due process of law is not violated, and the equal protection of the law is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has a hearing, or an opportunity for one, provided by statute. * * *

It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefit conferred by the improvement, and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the state constitution, yet as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the federal constitution is shown in such assessment. * * * Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of the *ad valorem* method of assessing lands is to be held a violation of the federal constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought to have nothing to do. THE WAY OF ARRIVING AT THE AMOUNT MAY BE IN SOME INSTANCES INEQUITABLE AND UNEQUAL, BUT THAT IS FAR

FROM RISING TO THE LEVEL OF A CONSTITUTIONAL PROBLEM, AND FAR FROM A CASE OF TAKING PROPERTY WITHOUT DUE PROCESS OF LAW."

In *Walston* v. *Nevin*, 128 U. S. 578:

"It was argued that this was not an assessment governed by the amount of benefits received, but was an absolute arbitrary and illogical method of assessment. This court held the objection not well founded, and that the matter was for the decision of the legislature, to which body the discretion was committed of providing for the payment of the improvement."

See, also,

Cleveland v. *Tripp*, 13 R. I. 59;
Kelley v. *Pittsburg*, 104 U. S. 78;
Parson v. *District of Columbia*, 170 U. S. 45;
Margaret French v. *Barber A. P. Co.*, 179 U. S. 879;
Webster v. *City of Fargo*, 181 U. S. 394.

THE FRONT FOOT SYSTEM.

In *Illinois Central R. R. Co.* v. *Decatur*, 147 U. S. 190, the cost of the improvement was defrayed

"By the special taxation of lots and parcels of land, abutting upon said street on both sides thereof along the line of said improvement."

This is a front foot assessment, and which was deemed proper.

In the case of *White* v. *The People*, 94 Ill. 604, it was held that the city council had power to charge the cost of a sidewalk upon the lots touching it, in proportion to their frontage thereon; that whether or not the special tax exceeded the actual benefit to the lots taxed, was not material; that it may be supposed

to be based upon a presumed equivalent; and that where the proper authorities determine the frontage to be the proper measure of benefits, this determination could *neither be disputed nor disproved.*

See, also,

Craw v. *Tolona*, 96 Ill. 255;
Enos v. *Springfield*, 113 Ill. 65;
Sterling v. *Gault*, 117 Ill. 11;
Springfield v. *Green*, 120 Ill. 269.

Section 4294, R. S. 1894, provides for notice to property holders, after the final estimate and report of the city engineer is filed with the common council, of the time and place when and where a hearing can be had upon such report before a committee to be appointed to consider such report, and such committee shall make report to the common council of such city, recommending the adoption or alteration of such report, and the common council of such city may adopt, alter or amend such report, and the assessments therein. Any person feeling aggrieved by such report shall have the right to appear before such committee and the common council of such city and make objections thereto, and shall be accorded a hearing thereon, and the common council of such city shall assess against the several lots or parcels of ground the several amounts which shall be assessed for and on account of such improvement.

This section would seem to fill every requirement of the decisions of the various courts which have pronounced on this subject.

The frontage system of disposing of improvements is therefore constitutional in the Barrett law if it is constitutional anywhere.

On the subject of frontage, see:

Shelly v. *Detroit*, 45 Mich. 431;

Elliott's Roads and Streets, 392, 393;
2 Dillon on Municipal Corporations, 760*b*;
Cooley on Taxation, 451;
2 Beach on Public Corporations, section 1072;
Am. & Eng. Enc. of Law, 306.

The frontage system has been upheld in Missouri, in the following cases:

Palmyra v. *Morton*, 25 Mo. 594;
Fowler v. *St. Joseph*, 37 Mo. 220;
Powell v. *St. Joseph*, 31 Mo. 347;
St. Joseph v. *O'Donoughue*, 31 Mo. 345;
St. Louis v. *Clements*, 49 Mo. 554;
Kelley v. *Cramer*, 51 Mo. 541;
Weber v. *Schergens*, 59 Mo. 390;
Rutherford v. *Hamilton*, 97 Mo. 543;
Farrar v. *St. Louis*, 80 Mo. ——.

The supreme court of Illinois has receded from the doctrine of *Chicago* v. *Larned*, 34 Ill. 203, and now sustains the frontage system of assessment in the following cases:

White v. *People*, 94 Ill. 604;
Sterling v. *Galt*, 117 Ill. 15;
Craw v. *Tolona*, 96 Ill. 255, 36 Am. R. 143;
Watson v. *Chicago*, 115 Ill. 78;
Biglow v. *Chicago*, 90 Ill. 53;
Fagan v. *Chicago*, 84 Ill. 234;
Enos v. *Springfield*, 113 Ill. 65;
Galesburg v. *Searles*, 114 Ill. 217;
Springfield v. *Green*, 120 Ill. 269;
Springfield v. *Sale*, 127 Ill. 359.

The New York court of appeals says of the frontage system that it may be the most just and equitable of any that could be adopted.

O'Riley v. *Kingston*, 114 N. Y. 439.

In California, the frontage rule is said to be "Perhaps the most uniform and least objectionable mode of assessing the property that could be adopted."

Whiting v. *Townsend*, 57 Cal. 515;
Bennett v. *Sacramento*, 12 Cal. 76.

The frontage system of assessments for street improvements obtains in Kansas.

See
Parker v. *Challiss*, 9 Kan. 155;
Newman v. *Emporia*, 41 Kan. 583.

The frontage system obtains in Kentucky also, as we have seen in the case of *Allen* v. *Woods*, 45 S. W. 106.

See, also,
Ludlow v. *Cin. S. R. Co.*, 78 Ky. 357.

The supreme court of Maryland holds the frontage system of assessment to be constitutional.

Baltimore v. *J. H. Hospital*, 56 Md. 1.

The frontage system prevails in Minnesota.

State v. *Reis*, 38 Minn. 371.

Also in New Jersey.

State v. *Fuller*, 34 N. J. L. 227.

Also in Ohio.

Ernest v. *Kunkle*, 5 Ohio St. 520;
N. I. R. Co. v. *Connolly*, 10 Ohio 159;
Corry v. *Foltz*, 29 Ohio St. 320;
Crawford v. *Cin.*, 26 O. L. J. 315.

And in Pennsylvania it is said that the frontage system of assessment is a mode not unreasonable nor

unequal. In the case of *Magee* v. *Com.*, 46 Pa. 358, it is said to be founded upon a policy of long standing.

McGonigle v. *Allegheny*, 44 Pa.;

Beaumont v. *Wilkesbarre*, 21 Atl. 888;

And the same is true in Virginia.

Davis v. *Lynchburg*, 84 Va. 861;

And the same is true of Rhode Island.

Cleveland v. *Tripp*, 13 R. I. 59;

In a recent Massachusetts case, viz., *Kingman et al.* v. *Metropolitan Sewerage Commissioners*, 27 N. E. Rep. 778, it is said that an objection upon behalf of a town that a state system of sewerage will not benefit it, because it has no sewerage, and an objection on behalf of another town that it has a system of its own, and therefore will not be benefited by the construction of a state sewer, are not material to the constitutionality of the act providing for the construction of such sewerage system, and requiring such town to pay a portion of the cost of the construction, to be ascertained and assessed by commissioners appointed by the legislature without any standard or rule having been prescribed for the government of the commissioners in determining the proportion each town must pay.

The frontage system of assessments prevails in North Dakota and many other states.

Rolph v. *City of Fargo*, 76 N. W. 242;

Roberts v. *First National Bank*, 79 N. W. 1049.

An assessment does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based on some benefit presumed to be received by the taxpayers.

In recapitulating somewhat we are pleased to say

that the question of assessment or apportionment can not be governed by the advantage or disadvantage to one person within the affected district. If so, public improvements could rarely, if at all, be made. The legislature, or the tribunal therefor created by it, must necessarily look at the district, *as a whole*, and *upon this view* determine whether such benefits will accrue from the improvement as will authorize its cost to be assessed upon adjacent property or the general treasury, or both in due proportions.

The whole question of benefits and damages is necessarily included in the question of the *necessity for making the improvement.*

The common council having the power of the legislature to order an improvement under the Barrett law, must, of course, ascertain whether the costs of the improvement exceed the benefits to the abutting owners, and, if they do not, charge them with the whole cost; if they do exceed the benefits charge the excess of cost to the general treasury. The assessment is an entirety, and there is philosophy in it as a whole. The Barrett law is simply the exercise of the power of taxation. It is substantially like the laws of other states in the means employed to make improvements. It departs from no fundamental exercise of this power. It enables the progressive to progress, and compels the laggard to move on, and so does any public improvement law. Under this law improvements have been made in many, many towns and cities in Indiana. The validity of outstanding bonds depends upon its constitutionality. It is a matter of far-reaching importance. Calamity would follow its unconstitutionality.

Appellant in Error, p. 21 of her brief, avers that—

"The avowed purpose of the Barrett law is to formulate a method by which public improvements can be made regardless of the objections or protests of property owners."

In response to that we have to say that the "avowed purpose of the Barrett law" is to constitute the common council of a city or the board of trustees of an incorporated town with power to make improvements and adjust assessments in making the same.

Said brief, at page 23, declares, in apparent wonderment, that the analysis of section 7 of the Barrett law, "The committee and the common council, together, are made the final arbiter on the assessment"; as if this fact makes the law unconstitutional. Has the legislature exceeded any power granted it by the constitution of the state in clothing the common council with this function?

Suppose the legislature had kept within its own *direct* management the making of such improvements, instead of designating and appointing the common council to do this thing, would it be an unconstitutional act of the legislature to determine the question of damages and benefits? Is the determination of such question unconstitutionally determined unless a court determines it? Can nothing but a court,—named as a *court*,—determine any question of fact?

In order that the reasoning of appellant may be sound it must be shown that courts of justice alone determine all questions of fact.

Indeed appellant's argument proceeds upon the premise that only courts of justice organized by the

qualification of a judge, with a clerk to record the proceedings and a sheriff to serve process, can determine any question of fact. If the premise is a false one the conclusion derived will probably be erroneous.

Appellant is admonished that the legislature may determine these questions of fact itself; and that if it can determine such questions itself it may appoint any tribunal it chooses to select and clothe it with this power without violating any fundamental, or other, law in doing so.

It is therefore eminently proper to say that these facts having been determined by the common council, the only question of trial in a court of justice, on appeal from the city council, shall be whether the said law has been duly carried out in making the improvement in the streets, alleys, etc.

Courts, as such, can have no concern about improvements or the desire for improvements. This is a question for the people and the agents of the people to determine. Counsel is mistaken greatly if it is supposed that courts of justice deal with such as a thing inherent in them.

Does a court of justice fix the rate of taxation on horses and sheep and upon real estate? The fact is, such things are none of the court's business. The court will only take a hand in such matters when there has been a failure to follow the law drawn for the direction and government of the same, but when a law has been followed by those charged with its application and enforcement, there is nothing for a court of justice to do.

Courts of justice may be endowed by the legislature with jurisdiction to determine questions of fact which the Barrett law has imposed upon the common council; but it is not bound to do it under the constitution

of the state or nation. The legislature can vest the determination of such questions in whom or in what it pleases—just so it secures uniformity, equality and benefits equal to the costs of improvements to the individual owner, or the general public, or both.

Just how appellant can read into this record the lists of the assessor of taxes for Huntington township as evidence of the inequality of this Williams street improvement, as is done at page 26 of appellant's brief, is not quite clear. This court can not give such volunteer information consideration. It is no part of the record, and is not of a character to involve judicial notice or knowledge.

Counsel here again fails to appreciate the fact that questions of damages and benefits and the manner of arriving at them are primarily with the legislature, and not with courts of justice. Neither is it here nor there that the Barrett law was repealed, as mentioned at page 29 of said brief. That fact does not prove that the Barrett law was unconstitutional. Many a *good law* has been repealed. Every succeeding legislature is impressed with its own wisdom and statesmanship. Even though some of the people did not like the Barrett law, as a reason for its repeal, as is also observed on page 29 of said brief, does not prove its unconstitutionality.

Indeed the dissenting opinion in the Shelbyville case (pp. 125–157 of the record) seems to have stranded on the same notion, that the legislature can not dispose of such questions of fact as damages and benefits and the manner of arriving at them, without referring same to a court of justice; that there is no due process of law on a fact determined outside of a court of justice. It loses sight of the just powers of the legislature.

If the front foot rule were an inequitable one, through which inequality must necessarily result, there might be some excuse for this strenuous effort to have the Barrett law declared subversive of constitutional rights. But this is not so. It is an equitable rule. It is better than a valuation rule, and it is a uniform, speedy and decisive means of settling benefit questions.

All of appellant's answers proceed upon the theory that she should have a right to come before each successive tribunal or court *and raise the question of benefits*. We can not conceive how there can be a stopping place if this is permitted.

Under this statute the only questions triable upon appeal to the circuit court are, and of right should be:

1. That the proceedings are regular.
2. That a contract has been made.
3. That the work has been done according to contract.
4. That the estimate has been properly made theron.

Appellant's answers do not raise any of these questions squarely, and the assignment of errors follows the answers.

This question has been settled by a long line of decisions in the Indiana Supreme Court, beginning with *Palmer* v. *Stumph*, and reaching down to the very latest decisions. We think we need do no more to establish the constitutionality of this law than to cite such authority, namely:

> *Palmer* v. *Stumph*, 29 Ind., p. 329; 114 Ind., p. 435; 125 Ind., p. 425; 124 Ind., p. 292; 129 Ind., p. 561; 133 Ind., p. 336; 136 Ind., p. 16; 43 Ind., p. 197.

These authorities find this law based upon the authority of the constitution of Indiana, which is an in-

strument as jealous of individual rights as the national constitution itself.

Summary.

The Barrett law is broad enough in its provisions to allow the common council to correct irregularities, and to relieve from hardships that might arise from mistake, location, or lack of benefit to any abutting property.

Section 2 provides for a two weeks' notice to be given ten days before the time set for hearing objections by property owners along the line of said proposed improvement, as to the necessity for the construction thereof. This section gives the property owner his first and best opportunity to appear before the council and present his views upon the matter. The human sense of justice and public opinion would compel justice in assessments, and the property owner can rest in assurance that his just rights will be protected and guarded.

Section 3 says that the city or town "may order that any part of the total cost of any of the improvements in this act mentioned shall be paid out of the general fund." This is a protection and security to the individual.

Section 4 provides that, "whenever the owner of any lot or part of lot, before the letting of such contract, shall have made any improvement in front of his lot or part of a lot, in accordance with the general plan for the improvement of such street or alley and under the direction of the city or town engineer, he shall be entitled to a reasonable allowance therefor upon his proportion of the cost of such improvement, etc." Justice is in every line here.

Section 5 says that, "if it is deemed just and right by the common council of such city or the board of trustees of such town may cause such expenses, or any part thereof, to be paid out of the general revenue of the city or the incorporated town." This is simple and exact justice.

Section 7 provides that the property owner may appear before the committee or the common council. "And the common council of such city or the board of trustees of such town may adopt, alter or amend such report and the assessments therein."

This seems to be conclusive of the matter and of the constitutionality of this law. What more can be asked?

Respectfully submitted,

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